No. 2745

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN PACIFIC COMPANY, a Corporation,

Plaintiff in Error.

vs.

FRANK R. STEWART,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

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STATEMENT OF THE CASE

This Writ of Error is brought by the Southern Pacific Company as Plaintiff in Error, to reverse a judgment of the United States District Court for the District of Arizona, rendered upon a verdict against the Southern Pacific Company, defendant below, and in favor of Frank R. Stewart, plaintiff below and defendant in error herein.

Defendant in error, plaintiff below instituted the action against plaintiff in error, defendant below, to recover compensatory damages in the sum of $2,695.00 and punitive

or exemplary damages in the sum of $1,000.00 for alleged injuries to 52 head of dairy cows shipped by defendant in error, on July 1st, 1913, from San Luis Obispo, California, over the railroad of plaintiff in error and the railroad of its connecting carrier, to Phoenix, Arizona.

Defendant in error alleged in his complaint that five of said animals died en route, that six died shortly after arrival at destination, that eighty-seven head were damaged in the sum of twenty dollars per head, that the animals which died and the eighty-seven head alleged to have been so injured were of the value of $85.00 per head.

The only act of negligence alleged was that the carrier unloaded the animals at the station of Yuma, Arizona, enroute, on July 4th, 1913, when the weather at said place was exceremely hot, and into pens which were dusty and unprotected from the sun, instead of transporting said animals to destination, Phoenix, Arizona.

Plaintiff in error set up both by plea and answer that at the time said animals arrived at Yuma, they had been confined in the cars for about twenty hours without feed, water or rest; that it was absolutely necessary to unload said animals at said place for feed, rest and water in order to comply with the proivsions of the Act of Congress known as the Twenty-Eight Hour Law, that said animals were unloaded at said place for the purpose of complying with said law and that it was impossible to have transported said animals to destination or beyond said station of Yuma, without violating said law.

Plaintiff in error also set up plea and answer that said animals were so transported under a certain contract in writing by which defendant in error agreed that in case any loss or damage should be sustained for which plaintiff in error might be liable that notice in writing should be given to plaintiff in error within ten days after unloading at destination, otherwise all claims for loss or damage were

thereby waived, that defendant in error did not give such notice within the time specified and that it was entirely possible for defendant in error to have done so.

That defendant in error by said contract stipulated that the agreed value of said animals was the sum of thirty dollars per head, that in case any loss or damage should be sustained for which the carrier might be liable, that the amount claimed for each animal so lost or damaged should be adjusted on the basis of said stipulated and agreed value.

That said contract was made and entered into in consideration of the defendant in error obtaining a lower published freight tariff rate than would have been otherwise assessed had a higher valuation been placed upon said animals.

That under and by virtue of said contract defendant in error expressly assumed all risk of loss or damage to said animals resulting from heat, suffocation or climatic conditions.

Plaintiff in error denied that it was guilty of any negligence whatsoever in transporting said animals.

The questions involved are:

1. The rulings of the court at the trial that certain evidence offered by plaintiff in error was inadmissible with reference to the condition and equipment of its cattle pens at Yuma, Arizona.

2. The ruling of the court denying motion of plaintiff in error at the close of the testimony, for a directed verdict.

3. The refusal of the court to give special charge requested by plaintiff in error in substance that if the jury believed said animals had been confined in the cars for approximately nineteen hours without feed or rest, upon arrival at Yuma, and that plaintiff in error could not or was not reasonably sure of being able to transport said animals from said town of Yuma, in said cars to destination, Phoenix, Arizona, without confining said animals in

the cars for a longer period than twenty-eight hours, they should find a verdict in its favor.

4. The refusal of the court to give special charge requested by plaintiff in error, in substance that if the jury believed it was more humane and better for said animals to unload them at Yuma for feed and rest than to transport them beyond that point, they shoud find in its favor.

5. The refusal of the court to give special charge requested by plaintiff in error, that if they believed it was possible for defendant in error to have given the written notice within ten days after unloading at destination of his claim for damages to the animals delivered at destination, and he did not do so, he could not recover for such loss or damage.

6. The refusal of the court to give special charge requested by the plaintiff in error in substance that plaintiff's claim for damages for injuries to the animals delivered at destination should be adjusted on the basis of the declared and agreed valuation of thirty dollars per head, and that if said animals after delivery at destination were of the value of thirty dollars per head and the freigiht charges thereon from point of shipment that he was not entitled to recover anything for any of such animals.

7. The refusal of the court to give special charge requested by plaintiff in error, in substance that if the jury believed the alleged loss or damage to said animals was due to any other cause than unloading at Yuma that defendant in error could not recover.

8. The refusal of the court to give special charge requested by plaintiff in error, that if the jury believed defendant in error caused said animals to be brought into Arizona, in July, and into an extremely hot and dry climate, and that defendant in error knew of such climatic conditions, and if such alleged loss or damage was due to such climatic conditions that defendant in error could not recover.

9. The refusal of the court to give special charge requested by plaintiff in error, that if defendant in error failed or neglected to attend to or properly care for his animals while they were at Yuma, and that any of the alleged loss or damage was due to said cause that defendant in error was not entitled to recover for such loss or damage.

10. The refusal of the court to give special charge requested by plaintiff in error, that defendant in error could not recover for any loss or damage to his cattle resulting from heat or climatic conditions.

11. The action of the court in charging the jury in its general charge:

(a) That it was the positive duty of plaintiff in error to have transported said animals beyond the station of Yuma, to some other place or station where said cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at Yuma, Arizona, on July 4, 1913, if such place could have been reached within the twenty-eight hour period.

(b) That defendant in error, plaintiff below was relieved from giving the carrier written notice of his claim for loss or damage to the cattle that were delivered, if plaintiff in error or its agents knew said cattle had been injured or if plaintiff in error was negotiating with defendant in error for settlement of his account.

(c) That the measure of damages for the cattle that were injured would be the difference between the market value of the animals in their normal condiition, at destination, and the condition in which they were actually delivered, not to exceed twenty dollars per head (the amount claimed in the complaint); in other words that the measure of damages would be the depreciation in the market value of cattle by reason of the injuries, not to exceed twenty dollars per head.

ASSIGNMENTS OF ERROR

Plaintiff in error relies upon the following Assignments of error:

1. Assignment of Error No. 1. (Transcript p 193). "That the court erred in sustaining the objection of counsel for defendant in error, plaintiff below, on the ground that the same was immaterial, to the following question propounded to the witness, J. J. Casey, by counsel for plaintiff in error, defendant below: 'Q. How do the cattle pens of the Southern Pacific Company at Yuma compare with the cattle pens in other places in Arizona and in the Southwest that you have seen and observed?' "

For the reason that said witness had already testified that he had resided in Arizona for thirty years and had been engaged in the cattle business and farming for twenty-five years; had had experience in shipping cattle into and out of Arizona and over the line of the Southern Pacific Company's railroad through the town of Yuma, and had seen and inspected the cattle pens of the Southern Pacific Company at Yuma and had seen and inspected the cattle pens in other places in Arizona and in the Southwest used for the purpose of unloading and feeding cattle in the coarse of transportation by railroad, and because the witness would have testified, if he had been permitted to do so, that the cattle pens of the Southern Pacific Company at Yuma ,and being the cattle pens in question in this law suit, were just as good and as properly equipped as other pens in Arizona and in the Southwest used for unloading and feeding cattle in the course of transportation by railroads, and that the cattle pens of the Southern Pacific Company at Yuma were properly equipped; and because said testimony was material in view of the allegations of plaintiff's complaint wherein he alleges that the cattle pens of the said Southern Pacific Company at Yuma were not properly equipped; and for the

reason that plaintiff in error, defendant below was not required to maintain at the said town of Yuma cattle pens equipped any differently or any better than cattle pens at other places in Arizona and in the Southwest similarly situated.

2. Assignment of Eddor No. 2. (Transcript p. 194). "The court erred in sustaining the motion made by counsel for defendant in error to strike out the answer made by the witness, J. J. Casey, as follows: 'Q. State whether or not those pens at El Paso, Texas, have any sheds over them for shade? A. No, sir, they have not.'"

For the reason that the witness had testified that he had shipped cattle through El Paso, Texas, by railroad; had unloaded cattle into the pens of the Southern Pacific Company ot El Paso, Texas, and had also seen the cattle pens at El Paso, Texas, of other railroad companies:

For the reason that the testimony was material in view of the issues raised by the pleadings, and in view of the contention of defendant in error that the cattle pens of the Southern Pacific Company at Yuma were not properly equipped because they did not have sheds over them."

3. Assignment of Error No. 3. (Transcript p. 195). "Said court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to the following questions propounded to the witness, J. J. Casey by counsel for plaintiff in error: 'Q. Please state whether or not the cattle pens of the Southern Pacific Company at Yuma compared favorably or are practically the same with reference to there being no sheds for shade for the cattle as the cattle pens of the railroads at Tucson, Bowie, and Phoenix, Arizona, El Paso, Texas, and Indio, California, places similarly situated and having the same climatic conditions as Yuma, Arizona?'

For the reason that the witness would have testified in answer to said question, if he had been permitted to do so,

and plaintiff in error expected to elicit from the witness in answer to said question that the cattle pens of the Southern Pacific Company at Yuma compare favorably with and were equipped practically the same as the cattle pens at other places named and which were similarly situated and having the same climatic conditions as Yuma, Arizona, and that none of such pens at such other places, so similarly situated, had sheds over them for shade, and that the cattle pens of the Southern Pacific Company at Yuma were properly equipped; and for the reason that said testimony was material in view of the issues raised by the pleadings, and in view of the contention by defendant in error that said cattle pens were not properly equipped because they did not have sheds over them for shade."

4. Assignment of Error No. 4. Transcript p. 196). "The court erred in sustaining the objection made by counsel for defendant in error, on the ground that the same was immaterial, to a certain question propounded to the witness Charles Davis by plaintiff in error, as follows: 'Q. Did you ever see any cattle pens with sheds over them in this country?'

For the reason that the witness had testified that he had lived in and around Phoenix, Arizona, all his life, about thirty-eight years, had shipped a great many cattle out of Arizona and into California and through the town of Yuma; that he was familiar with the cattle pens of the Southern Pacific Company at Yuma; and for the reason that the witness would have testified in answer to said question, if he had been permitted to do so, and plaintiff in error expected to elicit from said witness by said question that he had never seen any cattle pens with sheds over them in this country; and for the reason that said testimony was material in view of the issues involved in the action and in view of the contention of defendant in error that the cattle pens of the Southern Pacific Company at

Yuma were not properly equipped because they did not have sheds over them."

5. Assignment of Error No. 5. (Transcript p. 196). "That the said court erred in denying and refusing to grant the motion made by plaintiff in error, defendant below, at the close of the testimony, for a directed verdict in its favor:

For the reason that it was necessary for plaintiff in error to unload the cattle at Yuma, in order to comply with the Federal Act known as the Twenty-eight Hour Law; and for the reason that plaintiff is basing his claim for damages in this action upon the fact that the cattle were unloaded at Yuma instead of transporting them on to Phoenix, Arizona, their destination.

For the reason that the defendant in error, plaintiff below, abandoned his said cattle at Yuma, upon arrival at that place and refused to have anything further to do with them and refused and neglected to care for said cattle.

For the reason that the evidence showed that if the defendant in error had taken proper care of said cattle at Yuma, Arizona, they would not have suffered any damage or injury.

For the reason that the evidence also showed that all of the alleged loss, injury and damage to said cattle was caused wholly and solely by the gross negligence, fault and want of care of the defendant in error himself.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle the same was due to the fact that plaintiff caused said cattle to be shipped from a cool, moist climate, into an extremely hot and dry climate on the 4th of July, 1913.

For the reason that the undisputed evidence showed that if any loss or damage occurred to said cattle, the same was due wholly and solely and entirely to the climatic conditions, for which plaintiff in error was not liable or responsible.

For the reason that the undisputed evidence showed that the defendant in error, plaintiff below, knew at the time he shipped the cattle the climatic conditions then existing at Yuma, Arizona, and selected the time for such shipment, and for which plaintiiff in error was not liable.

For the reason that the undisputed testimony showed that prior to or at about the time the cattle were shipped from San Luis Obispo, California, defendant in error made and entered into a contract in writing with plaintiff in error, wherein and whereby defendant in error specifically agreed that plaintiff in error should not be liable for any loss, injury or damage to said livestock resulting from heat or climatic conditions.

For the reason that the undisputed evidence showed that if any loss, injury or damage occurred to said cattle, the same was due wholly, solely and entirely to the heat and climatic conditions existing at the time at Yuma, Arizona.

For the reason that the undisputed evidence showed, and it was admitted by defendant in error that at the time of the shipment of said cattle from San Luis Obispo, California, he made and entered into a contract in writing to and with the plaintiff in error, wherein and whereby he specifically agreed and bound himself to load said livestock at point of shipment, unload and reload at resting places and to feed and water the same at his own expense and to accompany and attend said livestock enroute and to destination; and wherein and whereby defendant in error specifically agreed to attend and care for said livestock during the course of such shipment; and for the reason that the undisputed evidence showed that the defendant in error failed, neglected and refused to attend and care for said cattle at said town of Yuma, the place at which defendant in error is alleging his said cattle were injured and damaged by reason of having been unloaded for feed and rest.

For the reason that the evidence showed, and it was ad-

mitted by defendant in error, that he made and entered into a written contract, as above referred to, wherein and whereby, among other things, it was agreed by and between the parties that the plaintiff in error, the railroad company was not required to deliver said cattle to defendant in error at destination unless the transportation charges on the same were paid; and for the further reason that it was admitted by the defendant in error that he did not pay the transportation charges.

For the reason that the undisputed evidence showed that there was no negligence whatever on the part of plaintiff in error, defendant below, in the handling and transportation of said cattle.

For the reason that the evidence failed to show any negligence whatsoever on the part of plaintiff in error, defendant below, in the handling and transportaton of said cattle."

6. Assignment of Error No. 6. (Transcript p. 199). "The court erred in refusing to give the special charge requested by plaintiff in error, as follows:

If you believe from the evidence that at the time the cattle mentioned in plaintiff's complaint, arrived at Yuma, Arizona, on the line of railroad operated by defendant, they had been confined in the cars approximately nineteen hours without feed and rest, and that plaintiff did not tender to or file with defendant or any of its agents any written request separate and apart from any printed bill of lading or other railroad form, authorizing defendant to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and that defendant could not or was not reasonably sure of transportating said animals from said town of Yuma, in said cars, to Phoenix, Arizona, the place of destination, without confining said animals in said cars for a longer

period than twenty-eight hours, then your verdict should be in favor of the defendant."

For the reason that the undisputed evidnece showed that defendant in error did not tender to or file with the plaintiff in error or any of its agents any written request, separate and apart from any printed bill of lading or other railroad form, authorizing plaintiff in error to confine said animals in said cars for a period of thirty-six hours from the time they had been loaded into such cars; and for the reason that the evidence showed that the plaintiff in error could not have transported said animals from the said town of Yuma, without confining said animals in the cars for a period longer than twenty-eight hours.

For the reason that the evidence showed that it was necessary for the plaintiff in error to unload said cattle at Yuma in order to comply with the Federal Act known as the Twenty-Eight Hour Law."

7. Assignment of Error No. 7. (Transcript p. 201). That said court erred in refusing the special charge requested by plaintiff in error, defendant below, as follows:

'4. If you believe from the evidence that at the time said animals arrived at Yuma, Arizona, they had been confined in the cars approximately nineteen hours without feed or rest, and that it was more humane and better for said cattle to unload them at Yuma for feed and rest than to transport them beyond that point and keep hem confined in said cars, then your verdict should be in favor of the defendant.'

For the reason that the plaintiff in error introduced evidence at the trial tending to show that it was better for said cattle and more humane to unload them at Yuma for feed and rest than to have transported them beyond that point.

For the reason that one of the issues involved in said acion was as to whether or not it was better for said cattle and more humane to unload them at Yuma for feed and

rest than to transport them to any other point in said cars."

8. Assignment of Error No. 8. (Transcript p. 201). "The court erred in refusing to give special charge requested by plaintiff in error as follows:

'5. If you believe from the evidence that it was less injurious to said animals to unload them at Yuma for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer, then you should find for the defendant.'

For the reason that one of the issues involved in the case was as to whether or not it was less injurious to such animals to unload them at Yuma, for feed and rest than to have kept them confined in said cars for nine hours or eighteen hours longer.

For the reason that plaintiff in error, defendant below introduced evidence tending to show that it was less injurious to unload said animals at Yuma for feed and rest than to have kept them confined in said cars for nine or eighteen hours longer."

9. Assignment of Error No. 9. (Transcript p. 202). "The court erred in refusing to give special charge request ed by plaintiff in error, defendant below, as follows:

'6. If you believe from the evidence that plaintiff made and entered into with defendant the written contracts as pleaded by defendant, providing that in case any loss or damage should be sustained to said animals in said shipment for which defendant would be liable, that plaintiff should make written demand on defendant within ten days after unloading said animals at destination; and that it was possible for plaintiff to have made such demand within such time, then you are instructed that plaintiff cannnot recover for any loss or damage to any of the animals so delivered at destination; but you are further instructed that as to any animals that may have died in

transit; or at destination while the same were still in the possession of the railroad company, plaintiff was not required to give such notice.'

For the reason that it was admitted by defendant in error, plaintiff below, that he did make and enter into the contracts as pleaded by plaintiff in error, defendant below, and for the reason that defendant in error, plaintiff below, admitted that he had not made written demand upon plaintiff in error, defendant below, or any of its agents, within the ten days after the unloading of said animals at destination for any claim for damages for injuries to the 87 head mentioned in plaintiff's complaint; and for the reason that the evidence showed that it was possible for defendant in error to have made such demand within such time, as to said 87 head."

10. Assignment of Error No. 12. (Transcript p. 203). "The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'If you believe from the evidence that plaintiff knew, or could have known by the exercise of reasonable diligence, within ten days after unloading said animals at destination that eighty-seven head of said animals were injured or damaged in the sum of twenty dollars per head, as alleged by plaintiff, and plaintiff did not, within ten days after unloading said animals at destination make written demand upon defendant or any of its agents for such alleged loss or damage, then you are instructed that plaintiff cannot recover for such alleged loss or damage.'

For the reason that the testimony of plaintiff himself shows that he knew within ten days after unloading said animals at destination that he had an alleged claim for the eighty-seven head of animals referred to, that he refused to pay the freight charges at destination giving as a reason therefor his alleged claim, and the evidence also shows that he knew or could have known by the exercise

of reasonable diligence, within ten days after the unloading of said animals at destination, whether or not he had a claim for damages to said eighty-seven head; and for the reason that the question as to whether or not defendant in error knew or could have known by the exercise of reasonable diligence within ten days after the unloading of said animals at destination whether or not he had a claim for damages to the eighty-seven head was one of the issues involved in said case and should have been submitted to the jury."

11. Assignment of Error No. 14. (Transcript p. 204). "The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'11. If you believe from the evidence that plaintiff, at the time said animals were delivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed valuation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount to be claimed by plaintiff for each of said animals, so lost or damaged should be adjusted on the basis of the value of such ani-

mals at the time and place of said shipment, to-wit: on July 1st, 1913, at San Luis Obispo, California; not exceeding the declared and agreed value thereof, to-wit, the sum of thirty dollars per head; and you further find that the loss and damage to plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to-wit: the unloading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein any greater sum for the animals that died in transit or before being removed from the pens at destination, than the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for any of said animals alleged to have been injured.'

For the reason that it was shown by the undisputed evidence and by the admission of defendant in error that the contracts were made and entered into as set forth in said requested instruction; that defendant in error thereby obtained a cheaper freight rate for the transportation of said animals than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; that defendant in error agreed that in case any loss or damage be sustained to said animals for which plaintiff in error would be liable that the amount to be claimed by defendant in error for each of said animals so lost or damaged should be adjusted on the basis of the value of such animals at the time and place of

shipment, to-wit, on July 1st, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value thereof, to-wit, the sum of thirty dollars per head; that the eighty-seven head for which defendant in error was claiming injuries or damages in the sum of twenty dollars per head were worth, after having received said alleged injuries, the sum of sixty-five dollars per head, and were sold for the said sum of sixty-five dollars per head and that defendant in error did not pay any freight charges on said animals for their transportation from San Luis Obispo, California, to Phoenix, Arizona.

And for the reason that under the law the defendant was not entitled to recover anything for the alleged injuries to the eighty-seven head sued for if said eighty-seven head were worth sixty-five dollars per head after arrival at destination and after receiving the alleged injuries.

And for the reason that under the law defendant in error was not entitled to recover anything on account of the alleged injuries or damages to the eighty-seven head sued for if said animals were worth more than thirty dollars per head after arriving at destination and after receiving said alleged injuries.

For the reason that said requested instruction embodied the correct interpretation or construction of the livestock shipping contracts in evidence as to the adjustment of claims for damages for injuries to the animals involved in said shipment.

12. Assignment of Error No. 15. (Transcript p. 205). "The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'15. If you believe from the evidence that the alleged loss and damage to plaintiff's animals was due to any other cause than unloading them at Yuma, Arizona, then you are instructed that plaintiff cannot recover and your verdict should be in favor of the defendant.'

For the reason that plaintiff in error offered evidence tending to prove that said animals were poor and weak and in a starved condition when shipped from San Luis Obispo, California, and for the reason that it was also shown by the undisputed evidence that any injury or damage suffered by said animals was caused by the heat and climatic condition and this question should have been submitted to the jury."

13. Assignment of Error No. 17. (Transcript p. 206). "The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'17. If you believe from the evidence that plaintiff caused said cattle to be brought from a cool and moist climate into Arizona in July, and into an extremely hot and dry climate, and that plaintiff knew of the climatic conditions then existing in Arizona, and the place or places to which he caused said animals to be transported; and any of the alleged loss or damage to said animals was due to such climatic conditions, then you are instructed that plaintiff cannot recover of defendant for such loss or damage.'

For the reason that it was shown by the undisputed evidence and by the testimony of defendant in error himself that said animals were brought from a cool and moist climate into Arizona, in July, into an extremely hot and dry climate, and that defendant in error knew of the climatic condition then existing in Arizona, and at Yuma, and that he selected the time for transporting said animals; and for the further reason that the undisputed evidence showed that some if not all of the alleged loss, injury *or* damage was caused by such climatic conditions, and for the reason that said question should have been submitted to the jury."

14. Assignment of Error No. 18. (Transcript p. 207).

"The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'18. You are instructed that if plaintiff failed or neglected to attend to unloading and loading his cattle at Yuma, or failed or neglected to properly care for his said cattle while they were at Yuma, and that any of the alleged loss or damage was due to such failure on the part of plaintiff to attend to and care for said cattle, that defendant is not liable therefor, and plaintiff cannot recover for any such loss or damage.'

For the reason that defendant in error (plaintiff below) by the livestock shipping contract made and entered into by and between him and plaintiff in error, absolutely agreed and bound himself to unload and reload said animals at resting places, and to feed and water said animals at his expense, and to accompany and attend and care for said animals en route and to destination.

And for the reason that the undisputed evidence showed, and which was admitted by defendant in error, that he (defendant in error) failed, neglected and refused to assist in unloading said cattle at Yuma, and failed, neglected and refused to attend to and care for said animals at Yuma, and abandoned the same.

And for the further reason that it was admitted by defendant in error's own witness, who was one of the caretakers of said animals accompanying said shipment for defendant in error, that if defendant in error had properly attended to said animals while at Yuma, and properly taken care of the same, that none of said animals would have died.

And for the reason that it was shown by the undisputed evidence and by the admissions of defendant in error and of his own witnesses and caretakers that at least some of the injury or damage was due to the failure and neglect of defendant in error to properly care for and attend to said animals at Yuma.

And for the further reason that said question should have been submitted to the jury.

15. Assignment of Error No. 19. (Transcript p. 213). "The court erred in refusing to give special charge requested by plaintiff in error, as follows:

'19. You are instructed that plaintiff cannot recover of defendant for any loss or damage to his cattle resulting from heat or climatic conditions, and if you believe that the alleged loss or damage to plaintiff's cattle was due to the heat at Yuma, or to the climatic conditions at that place, then your verdict should be in favor of the defendant.'

For the reason that the contracts in evidence specifically provided that defendant in error assumed all risk of loss or damage to said livestock, resulting from heat, or climatic conditions; that there was a sufficient consideration for such agreement; and for the reason that the undisputed evidence showed that the alleged loss and damage was due solely and entirely to the heat at Yuma and the climatic conditions at that place.

And for the reason that the undisputed evidence showed that plaintiff in error had nothing whatever to do with choosing the time of transporting said cattle, but that defendant in error himself selected the time for such transportation; that defendant in error knew before he shipped said cattle of the climatic conditions then existing at Yuma, and in Arizona; that the weather and climatic conditions at that time at Yuma were extremely hot and dry; and that it would be injurious to said animals to ship them from a moist and cool climate, as then existed in and around San Luis Obispo, California, into Arizona and through Yuma, where there existed such an extremely hot and dry climate."

16. Assignment of Error No. 23. (Transcript p. 219).

"The court erred in charging the jury in the general charge as follows:

'In this same connection you may also determine whether or not there was on said 4th day of July, 1913, any other place or station on defendant's line which the train carrying these cattle, and operating on its schedule, could have reached within the twenty-eight hour period, at which the cattle could have been unloaded, fed, watered and rested, under conditions more favorable than existed at said town of Yuma on July 4, 1913. If you find from the evidence that the defendant had other corrals on its line of road and in the direction in which plaintiff's shipment was moving, into which plaintiff's cattle could have been unloaded within the twenty-eight hour period and in a more humane manner than by unloading at Yuma under the circumstances developed in this case, then it was the defendant's duty to transport said cattle to such station for unloading.'

For the reason that the evidence showed that at the time the cattle arrived at Yuma they had been confined in the cars, without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying said cattle would necessarily have had to remain at Yuma, in the yard at that place for the purpose of inspection, changing engines, changing crews, etc., for at least one hour before it could have departed from Yuma; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station on the line of plaintiff in error at which there were any cattle pens for unloading for feed and rest was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; that it would have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in

said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

For the reason that the evidence showed that it was better for the cattle and more humane to unload at Yuma than to have transported them any further.

For the reason that the evidence showed that plaintiff in error did not have other corrals or cattle pens on its line of road, in the direction in which the shipment was moving, into which said cattle could have been unloaded, which could have been reached by said train within twenty-eight hours from the time the cattle had been loaded in Los Angeles, California.

For the reason that the undisputed evidence showed and defendant in error admitted that he (defendant in error) abandoned said cattle at Yuma, and failed, neglected and refused to attend to or care for them, and for the reason that it was the duty of defendant in error under the contracts in evidence to attend to and care for said cattle en route to destination."

17. Assignment of Error No. 24. (Transcript p. 221). "The court erred in charging the jury in the general charge, as follows:

'The defendant company also pleads that notwithstanding the fact that it may have been guilty of negligence in the particulars set out in the complaint, nevertheless the plaintiff in this case cannot recover, because the contract heretofore referred to (and which was signed by the plaintiff, and by Mr. Ford and Mr. Whitten, on behalf of the plaintiff, who were thereunto duly authorized) provides that the "second party hereby further agrees that in case of any loss or damage shall have been sustained for which first party is liable, demand or claim for such loss or damage will be made by the second part on the Freight

Claim Agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do, all claims for loss or damages in the premises are hereby expressly waived, released and made void." Defendant alleges that no claim for loss or injury to said cattle was presented to it, or any of its agents or employes within the ten-day period. If you find this to be true, then, of course, the plaintiff cannot recover unless you further find that the defendant waived this provision of the contract, or that the plaintiff was relieved from a compliance therewith as is hereinafter stated. The plaintiff in reply to this contention, that the claim should have been presented in writing within ten days after the unloading of the livestock, alleges that he was relieved from compliance with the above quoted provision in that "on the 4th day of July, 1913, and at all times subsequent to the arrival of said cattle at * * * Yuma—(I say, subsequent to the arrival of said cattle at Yuma)—the defendant had full knowledge and notice of the injuries and damages to plaintiff's cattle as set forth in its said complaint; that said cattle were unloaded by the defendant into its stock pens at the station of Yuma between the hours of 9 and 10 o'clock A. M. on the 4th day of July, 1913, and between said dates and the hour of 7:30 P. M. of said day, and prior to the reloading of the cattle into defendant's cars, five of the said cows died. * * * * That upon reloading the said cattle it became necessary to provide, and the defendant did provide, an additional car in which to ship thirteen of the crippled and sick cattle of the plaintiff to their destination at Phoenix; that at various points between said station of Yuma and the city of Phoenix the train officials in charge of said shipment received telegraphic inquiries from other officials of the defendant inquiring as to the condition and welfare of said shipment; that upon the arrival of said shipment at Phoenix, Arizona, one of said crippled animals remained in defendant's car

for a period of more than a week; and that immediately after the unloading of said shipment at Phoenix, Arizona, and almost daily from said date until the 21st day of October, 1913, the plaintiff and the agents of the Arizona Eastern Railroad Company and of this defendant were in communication relative to the damages sustained by the plaintiff; that the nature and extent of the injuries to the plaintiff's cows which arrived at the destination alive, were such as to render it impossible for the plaintiff, or any other person else in the exercise of due care and diligence, to determine the amount and extent of damage sustained by the plaintiff within the said ten-day period; that a number of said cattle died many days after their arrival at Phoenix, Arizona, as the result of such injuries * * * that the defendant had on many occasions prior to the 21st day of October, 1913, recognized plaintiff's right to recover in some amount on account of his damages, sustained as set forth in his said complaint, and has on many occasions attempted to settle and compromise said claim with the plaintiff." I repeat those allegations of the reply in order to show what the plaintiff claims as his reason or excuse for not having presented his claim in writing to the defendant company or its agents within ten days from the date of such loss or injury, as is provided by the contracts.

I charge you as a matter of law that if you believe the defendant or its agents or employes did know that five or more of the cattle died while in transit, and also believe that the defendant was negotiating with the plaintiff for a settlement of his claim, and that the defendant knew that the cattle had been injured as alleged in the plaintiff's complaint, then the plaintiff was relieved and released from the giving of such notice of loss or injury within ten days as required by the said provisions of said contracts.'

For the reason that the evidence showed that plaintiff in error had never waived the giving of such notice; that the defendant in error was not relieved from giving such

notice; that it was entirely possible for defendant in error to have given the notice as to his alleged claim for damages to the eighty-seven head mentioned in the complaint within the ten days.

For the reason that defendant in error admitted he knew within the ten days that he had an alleged claim for damages as to said eighty-seven head, and that he knew or should have known within the ten days the condition of the cattle.

And for the reason that any negotiations that defendant in error may have had with plaintiff in error with reference to compromise or settlement did not constitute a waiver on the part of plaintiff in error of the provisions in said contracts requiring written claim for loss or damage to be made within ten days after the animals were unloaded at destination.

18. Assignment of Error No. 25. (Transcript p. 224). "The court erred in charging the jury in the general charge, as follows:

'The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant, its agents or employes, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. Shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny

liability for actual damage up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona ,and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damages to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damages suffered by the plaintiff you can consider the market value of the cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and

you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle *were* injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured.'

For the reason that the contracts in evidence and referred to expressly provided that in the event any of said animals sustained any loss or damage for which plaintiff in error was liable that the amount to be claimed for each animal so lost or damaged should be adjusted on the basis of the value at the time and place of shipment, to-wit, July 1, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value of thirty dollars per head, and that in no event should there be any recovery for any loss or damage to said live stock from whatever cause arising in excess of the declared and agreed value of thirty dollars per head.

And for the reason that the undisputed evidence showed and it was admitted by defendant in error that all of the said eighty-seven head mentioned in the complaint and for which defendant in error was claiming twenty dollars per head for alleged injuries, were worth more than thirty dollars per head after arrival at destination, and after having received said alleged injuries, to-wit, that they were worth sixty-five dollars per head and were sold by defendant in error after arrival at destination and after having received said alleged injuries for sixty-five dollars per head.

And for the reason that it was not proper to adjust the alleged damages by taking the difference between the market value, or what would have been their market value in their normal condition, and their value in the condition in which the cattle were delivered at destination.

For the reason that said charge placed an erroneous construction and interpretation upon the terms of said contracts in the particulars above pointed out."

ARGUMENT.

FIRST: *First, Second Third and Fourth Assignments of Error.*

Defendant in error, plaintiff below, alleged in his complaint that the stock pens of plaintiff in error at Yuma, into which his cattle were unloaded "were very dusty and entirely unprotected from the rays of the sun" (Tr. p. 3) and introduced evidence to show that there were no sheds over the pens (Tr. pp. 83, 90, 100) claiming that the pens should have been equipped wth sheds over them.

This raised an issue as to whether or not it was incumbent upon plaintiff in error to have had its stock pens at such place covered with sheds.

The questions propounded to the witnesses Casey and Davis constituted an offer by plaintiff in error to prove that the stock pens in question were just as good and as properly equipped as other stock pens in Arizona and in the Southwest and in places similarly situated and having the same climatic conditions used for unloading, feeding and resting cattle in the course of transportation; and that no stock pens of any railroad company in Arizona or in the Southwest and places similarly situated as to climatic conditions had sheds over them.

The witness Casey had testified that he had lived in Arizona and in and around Phoenix for thirty years, had been engaged in the cattle business for twenty-five years, had experience in shipping cattle in and out of Arizona, had seen and inspected the cattle pens of plaintiff in error at Yuma and had seen and inspected cattle pens in other places in Arizona and the Southwest used for unloading and feeding cattle . (Tr. pp. 132, 133).

The following question was prounded to the witness Casey by counsel for plaintiff in error.

"Q. How do the cattle pens of the Southern Pacific Company at Yuma compare with the cattle pens in other places in Arizona and in the Southwest that you have seen and observed?"

Which question was objected to by counsel for defendant in error, upon the ground that it was immaterial, which objection was sustained by the court, and which ruling was duly excepted to . (Tr. p. 133).

The witness also testified that he had shipped cattle through El Paso, Texas, by railroad, had unloaded cattle into the pens of the Southern Pacific Company at that place and had also seen the cattle pens at El Paso, Texas, of other railroad companies (Tr. p. 136). That none of the cattle pens at El Paso, Texas, had any sheds over them for shade.

Counsel for defendant in error moved to strike out the testimony of the witness as to there being no sheds over the cattle pens at El Paso, Texas, which motion was granted by the court, and which ruling was duly excepted to. (Tr. p. 136).

The following question was also prouounded to the witness Casey by counsel for plaintiff in error:

"Q. Mr. Casey, how did the cattle pens of the Southern Pacific Company, at Yuma, compare with the cattle pens in other places of like climatic conditions, with reference to having sheds over them for shade?"

Which question was objected to by counsel for defendant in error upon the ground that it was not a comparative question and had no tendency to prove or disprove any issue, which objection was sustained by the court, and which ruling was duly excepted to. (Tr. p. 136).

The witness Davis testified that he was engaged in the cattle business and cattle shipping business in Arizona,

had shipped a good many cattle in and out of Arizona, was familiar with the cattle pens at Yuma. (Tr. p. 138).

It was stipulated that the record might show that the same questions were propounded to the witness Davis as were propounded to the witness Casey with reference to sheds over cattle pens at Yuma and other places in Arizona, and in the Southwest, the same objections by counsel for defendant in error, the same rulings of the court thereon and exceptions to such rulings by counsel for plaintiff in error. (Tr. p. 139).

The testimony plaintiff in error expected to elicit from the witnesses Casey and Davis was that the cattle pens of the Southern Pacific Company at Yuma were just as good and as properly equipped as other cattle pens of any other railroad company, in Arizona and in the Southwest, and places similarly situated as to climatic conditions, used for unloading and feeding cattle; that the cattle pens at Yuma were properly equipped; and that it was not necessary to have sheds over them.

The action of the court in holding that such testimony was immaterial was clearly prejudicial to plaintiff in error. The court charged the jury that it was the duty of the defendant company to unload the cattle for feed, rest and water into pens properly equipped therefor. That having heard all the evidence it was for them to determine whether or not the corrals and pens at Yuma were such as the law requires railroads to furnish for the proper unloading, feeding, resting and watering of cattle. (Tr. p. 167).

Therefore the jury should have been permitted to hear and consider the testimony of experienced cattlemen as to what kind of pens were proper pens for unloading, feeding and resting cattle, and as to whether or not a railroad company should be required to have sheds over its pens.

It seems to us that this testimony to the effect that the stock pens of the plaintiff in error at Yuma were the same

as those in use at other places similarly situated as to climatic conditions, and in use on other railroads in such places, and that no cattle pens in use in such places had sheds over them, was relevant, material and competent, in view of the issue in the case on that question, and in view of plaintiff's allegations in effect that plaintiff in error was negligent because it did not have sheds over its pens at Yuma.

The witnesses Casey and Davis were expert witnesses, qualified and competent to testify as to what kind of pens were proper for unloading, feeding and resting at Yuma, and the jury should have been permitted to consider the testimony of such expert witnesses as to whether or not cattle pens should have sheds over them, in connection with the other evidennce in the case.

In the case of St. L. & S. F. R. Co. v. Brosius, et al, (Tex.), 105 S. W. 1131, which was a suit to recover damages to shipment of mules, a part of such damages being claimed to have been caused by unloading the mules into an unsanitary stock pen en route, the Court of Civil Appeals of Texas, in its opinion reversing the case used the following language: (p. 1134).

> "The pens were open and were constructed as pens usually are constructed in Missouri. The soil was inclined to be sandy or gravel, and that the weather on this occasion was clear until late in the afternoon on January 17th. The pens were slightly muddy, but the mud was not very deep."

SECOND: *Assignment of Error No. 5. Defendant's Motion for Directed Verdict.*

The Act of Congress entitled "An Act to Prevent Cruelty to Animals while in transit by railroad or other means of transportation from one state, territory or the District of Columbia, into or through another state, territory or the District of Columbia," etc., approved June 29, 1906, 34

Stat. L, p. 607; 1909 Supp. Fed. Anntd. Statutes, p. 43, provides:

> "(Sec 1.) (*Transportation of animals—time limit for confinement on cars and vessels—extension of time by written request—time of unloading and loading not included—sheep.*) That no railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, whose road forms any part of a line of road over which cattle, sheep, swine, or other animals shall be conveyed from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, or the owners or masters of steam, sailing, or other vessel carrying or transporting cattle, sheep, swine or other animals from one State or Territory or the District of Columbia into or through another State or Territory or the District of Columbia, shall confine the same in cars, boats, or vessels of any description for a period longer than twenty-eight consecutive hours without unloading the same in a humane manner, into properly equipped pens for rest, water, and feeding, for a period of five consecutive hours, unless prevented by storm or by other accidental or unavoidable causes which can not be anticipated or avoided by the exercise of due diligence and foresight: *Provided,* That upon the written request of the owner or person in custody of that particular shipment, which written request shall be separate and apart from any printed bill of lading, or other railroad form, the time of confinemay be extended to thirty-six hours. In estimatinng such confinement, the time consumed in loading and unloading shall not be considered, but the time during which the animals have been confined without such rest or food or water on connecting roads shall be included, it being the intent of this Act to prohibit their continuous confinement beyond the period of twenty-eight hours, except upon the contingencies hereinbefore stated: *Provided:*, That it shall not be required that sheep be unloaded in the night time, but

where the time expires in the night time in case of sheep the same may continue in transit to a suitable place for unloading, subject to the aforesaid limitation of thirty-six hours.

Sec. 2. (*Feeding animals at expense of owner—lien upon animals for costs—owner may furnish food.*) That animals so unloaded shall be properly fed and watered during such rest either by the owner or person having the custody thereof, or in case of his default in so doing, then by the railroad, express company, car company, common carrier other than by water, or the receiver, trustee or lessee of any of them, or by the owners or masters of boats or vessels transporting the same, at the reasonable expense of the owner or person in custody thereof, and such rialroad, express company, car company, common carrier other than by water, receiver, trustee, or lessee of any of them, owners or masters, shall in such case have a lien upon such animals for food, care, and custody furnished, collectible at their destination in the same manner as the transportation charges are collected, and shall not be liable for any detention of such animals, when such detention is of reasonable duration, to enable compliance with section one of this Act; but nothing in this section shall be construed to prevent the owner or shipper of animals from furnishing food therefor, if he so desires."

Sec. 3. (*Penalty for non-compliance—exception.*) That any railroad, express company, car company, common carrier other than by water, or the receiver, trustee, or lessee of any of them, or the master or owner of any steam, sailing, or other vessel who knowingly and wilfully fails to comply with the provisions of the two preceding sections shall for every such failure be liable for and forfeit and pay a penalty of not less than one hundred nor more than five hundred dollars: *Provided,* That when animals are carried in cars, boats, or other vessels in which they can and do have proper food, water, space, and opportunity to rest the provisions in regard to their being unloaded shall not apply."

The cows were loaded at San Luis Obispo, California, on July 1, 1913, in the afternoon, arriving at Los Angeles, on July 2, were unloaded there about noon of that day, for feed, water and rest and in order that they might be milked (Tr. p. 82-98-142). They were loaded into the cars again at Los Angeles on the afternoon of July 3rd. (Tr. p. 143).

The plaintiff testified he did not keep any record of the exact time of reloading at Los Angeles. (Tr. p. 87).

Witness for plaintiff in error, F. D. Martin, testified by deposition that he was employed as corral keeper for defendant company at Los Angeles on July 2 and 3, 1913, that he unloaded, fed and watered these animals at that place, that he made a record at the time of the date and time of unloading and reloading, and produced such original record. (Tr. p. 142). That the cattle were unloaded at Los Angeles at 2:45 and 3:00 p. m. on July 2, 1913, and were reloaded at 3:40 and 4:25 p. m. (Pacific Time) the following day, July 3rd. (Tr. p. 142-143).

Witness William Wilson testified that in July, 1913, he was Chief Train Dispatcher for plaintiff in error company, with jurisdiction over the road from Yuma, Arizona, to El Paso, Texas. That as such he had charge of handling of all cattle shipments over the road, that he was on duty at Tucson, at Division Headquarters on July 4, 1913. (Tr. p. 113). That these cattle arriived at Yuma at 11:35 a. m. Mountain Time, same as 10:35 a. m. Pacific Time, on July 4th. (Tr. p. 117).

Witness Howard testified that he was Train Dispatcher on duty at Tucson from eight o'clock in the forenoon until four o'clock in the afternoon of July 4th, that he had jurisdiction over the road from Tucson to Yuma. (Tr. p. 122). That he wrote down on the train sheet the time of the arrival at Yuma of the train containing the five cars of cattle, at the time of the arrival of such train. The witness identified the original train sheet made by him on

July 4th, and the figures written thereon by himself at the time as to the time of the arrival of the train at Yuma, 11:30 a. m., Mountain Time. (Tr. p. 122-123).

The original train sheet so identified was admitted in evidence and that portion pertaining to the train which brought these cattle into Yuma is in the record. (Tr. pp. 117, 189). The train sheet shows that the train in question, "Second 244," arrived at Yuma at 11:35 (Mountain Time), which is the same as 10:35 (Pacific Time). (Tr. p. 189).

Defendant in error and his witnesses testified that the train arrived at Yuma about nine o'clock in the morning of July 4th (Tr. pp. 83, 89, 98), but they made no record at the time of the exact time of such arrival and had no record, but were testifying from memory, (Tr. pp. 87, 92, 98), more than two years after the occurrence, and in the face of the positive and almost incontrovertible evidence of Chief Dispatcher Wilson and Dispatcher Howard and the record made at the time on the train sheet, that the train arrived at Yuma at 11:35 a. m., Mountain Time.

Therefore, upon arrival at Yuma, the cattle had been confined in the cars without feed, water or rest for a period of eighteen hours and ten minutes, and counting from the time the loading was commenced at Los Angeles, 3:40 p. m., July 3rd, to 10:35 a. m. of July 4th, they had been on the cars for eighteen hours and fifty-five minutes.

Chief Dispatcher Wilson testified that if the cattle had been transported on from Yuma, without unloading, and in the same train which brought them in, that it would have taken the train about one hour and ten minutes to have gotten out of Yuma (Tr. p. 118), which would have meant that the cattle would have been in the cars at the time of leaving Yuma for at least nineteen hours and twenty minutes (from the time loading was completed in Los Angeles), with only eight hours and forty minutes of

the twenty-eight left to get them to the next unloading point.

But defendant in error is basing his right to recover upon the allegation that plaintiff in error unloaded the animals at Yuma instead of transporting them on to Phoenix, the destination, without unloading for feed and rest. (See Complt. Tr. p. 5).

If the cattle had been transported on to Phoenix after arrival at Yuma, without unloading at Yuma, they would have been in the cars in the neighborhood of thirty-six hours and thirty minutes or thirty-seven hours. (Tr.p.117).

It was absolutely impossible to have transported them on from Yuma to Phoenix within the twenty-eight hours (Tr. p.p. 117-118).

We contend this is a complete defense to this action. In other words that the plaintiff in error was not guilty of any negligence in unloading the animals at Yuma for feed, water and rest in order to comply with the Federal Act known as the Twenty-eight Hour Law, which defense plaintiff in error set up by plea and answer. (Tr. pp. 13 to 18, inc., 29 to 34, inc.).

> *St. L. & I. M. Ry. Co. v. Davenport* (*Ark.*) 133 S. W. 186:
>
> "It was the duty of the railroad company to stop the shipment for rest, water and feeding of the cattle at a convenient place which it could select, if not unreasonably or arbitrarily done, when it was apparent that it could not be delivered at destination in the usual course of business within the 28-hour limit, appellee having refused to sign the 36-hour release and such delay in the performance of this duty was not negligence on its part."
>
> *Hickey v. C. B. & Q. R. R. Co.* (Mo. App.) 160 S. W. 24:
>
> "A delay caused solely by defendant's compliance with the provisions of the Twenty-eight Hour Law could not be actionable, since it should be regarded

as the result of the performance of a duty imposed by law."

K. C. M. & O. Ry. Co. v. Moore (Tex. Civ. App.) 149 S. W. 302:

In this case negligence was charged against the carrier because the animals were delayed in transit and also because the pens into which they were unloaded were unsanitary.

The court said: "It is clear from the testimony that no negligence is shown on the part of the appellant or any of its employees in unloading and detaining the stock at Monette for the time they did. The law requires that stock being shipped over railroad lines shall not be kept longer than 28 hours without being unloaded, watered, fed and rested. Appellant had the right if it was not its duty to unload and rest this carload of stock at the time and place it did. They had been in transit from the time they were loaded about nineteen hours and could not have been carried much longer without violating the provisions of the Federal law upon that subject."

Ecton v. C. B. & Q. Ry Co., (Mo. App.) 102 S. W. 575:

"Where a reasonable time for the transportation of an interstate shipment of cattle exceeded 28 hours which was the longest time the carrier was authorized to keep the cattle in the cars without unloading for rest, food and water, as provided by Rev. Stats. U. S. Sec. 4386 (U. S. Com. Stat. 1901, p. 2995) and if time had not been lost by delays the transportation period would not have been less than 28 hours, delay caused by the carriers unloading cattle in transit for rest, food and water under such act was not negligence."

In the case of *Oregon-Washington R. & Nav. Co. v. United States*, 205 Fed. 337, this court said:

"The statute (the Twenty-eight Hour Law) imposes upon the carrier the primary duty of seeing that the stock is not confined in cars longer than the pre-

scribed period, for the command of the statute is 'Thou Shalt Not' fail to do the thing required; and, while the carrier may arrange with the shipper or the person in charge for unloading, the company cannot thereby shift the burden, and the responsiibility for unloading in time still rests with it. The company, therefore, having knowledge of the attending conditions, which intentionally disregards the statute, or is purposely indifferent to its behests, is rendered amenable thereto."

St. L., I. M. & S. Ry. Co. v. Smith, (Texas) 135 S. W. 597:

In this case the court said: "The testimony was undisputed that the cattle could not be transported from Texarkana to St. Louis within 28 hours. It was necessary therefore for appellant, to avoid violating the statute referred to (U. S. Rev. St., Sec. 4386, 4388, U. S. Comp. Sts. 1901, pp. 2995-2996) to unload the cattle en route for the purpose of feeding and watering them and permitting them to rest for at least five hours. It could not be charged with negligence for a delay necessary to avoid a violation of the law, and the jury should have been instructed to that effect."

It will be noted that the defendant in error, plaintiff below, alleged in his reply to the answer of plaintiff in error, that upon the arrival of the cattle at Yuma, he tendered a request in writing, separate and apart from his shipping contract, to plaintiff in error, extending the time for unloading and resting to thirty-six hours (Tr. p. 48), but upon the trial it was shown conclusively that no such written request had been tendered and the court charged the jury in this connection that: "The plaintiff having failed to sign and tender such written request, the defendant company was required by the United States Statutes to unload, feed, water and rest the said cattle at some point on its line of railroad within twenty-eight hours from the time the same left Los Angeles, California." (Tr. p. 167).

If these cattle had been transported on from Yuma without unloading, to the next unloading point, Gila, in the same train, it would have taken about ten hours to have made the run (Tr. p. 119, 120, 121), which would have exceeded the 28-hour limit.

It is true this same train did reach Gila at 7:20 p. m., barely within the twenty-eight hours, but it would not have arrived at Gila as soon as it did if it had taken the five cars of cattle. (Tr. p. 119). The tonnage of this train was reduced by taking out the five cars of cattle (Tr. p. 121), otherwise it would have taken it two hours longer. (Tr. p. 121).

If the five cars of cattle had remained in the train it would have been necessary to double one of the hills which would have caused a delay of one hour, and with the extra five cars of cattle the train would have been unable to make the time it did. (Tr. p. 121).

Defendant in error, plaintiff below, testified that he abandoned his cattle at Yuma (Tr. p. 83) and that he boarded a passenger train at Yuma and went on to Phoenix, leaving his cattle at Yuma. (Tr. p. 88). His two caretakers also abandoned the cattle at Yuma and neglected to properly care for them. (Tr. pp. 83, 90, 93, 102).

The witness Ford, one of the caretakers and a witness for defendant in error, testified that "if we had poured water on the cattle immediately upon unloading at Yuma and kept pouring water on them undoubtedly we could have kept them from getting hot and that would have saved them. If we had stayed there and poured water on them it would have kept them from getting overheated. (Tr. p. 93).

The witness Ford also testified that the defendant in error, Stewart, refused to go down and help take care of the cattle (Tr. p. 93) and that he, Ford, did not help take care of them until they were dying from the heat. (Tr. p. 93).

In this connection, by the contract in evidence, defendant in error agreed to load said livestock at point of shipment, unload and reload at resting places, and unload at destination, and to feed and water at his expense, and to accompany and attend said livestock en route to destination. (Tr. p. 188).

In the case of Webster v. Union Pacific R. Co., 200 Fed. 597, it was held that such an agreement was valid as between the shipper and the railroad company. That such an agreement did not contravene the provisions of the Federal Act known as the Twenty-eight Hour Law, since that Act in terms provides that the owner of the animals shall primarily be charged with feeding and watering them. That while such provision would not afford any defense to a prosecution by the government for failure of the railroad company, upon the owner's default, it is, as between the owner and the railroad, a sufficient defense, since it is tantamount to an allegation that the railroad company was not itself negligent, but that the negligence was that of the owner of the animals in and about a matter as to which such owner had contracted to assume the sole responsibility. Citing Mo. Pac. Ry. Co. v. T. & P. Ry. Co., 41 Fed. 913.

The contracts under which the shipment moved contained a provision, among others, that the shipper, defendant in error, assumed all risk of loss or damage of or to said livestock resulting from heat, suffocation or climatic conditions. (Tr. pp. 23, 25, 27).

Defendant in error, plaintiff below, testified that he had lived in Arizona for fifteen years, had been engaged in the cattle business for a couple of years, had shipped cattle into Arizona from San Luis Obispo, California, that San Luis Obispo is near the coast, that it was not hot where he obtained the cattle involved in this suit, that he knew it was pretty warm around Phoenix and Yuma, Arizona,

in July, that he knew it was warm through Southern California at that season of the year where the cattle had to pass through, and that he selected the time for shipping the cattle. (Tr. p. 86).

The witness Ford testified that he formerly resided near San Luis Obispo, California, (Tr. p. 88), that San Luis Obispo has a good climate, that the fog comes in from the ocean, that the climate of San Luis Obispo in the summer time is much cooler than that of Arizona. (Tr. p. 92).

Our contention is that the undisputed evidence showed conclusively that any injury or damage to the cattle was due solely and entirely to the fact that the cattle were shipped from a cool, moist climate into an extremely hot and dry climate in the month of July, that such injury or damage was due solely to the climatic conditions, that defendant in error knew of such climatic conditions and himself selected the time to ship said cattle and that plaintiff in error is not therefore liable for any such injury or damage.

> *L. & N. R. Co. v. Warfield,* (Ky.) 98 S. W. 313:
> Quoting from the syllabus: "A carrier is not liable for the loss or injury to livestock caused by unprecedented climatic conditions where the provisions for the protection of stock are sufficient for ordinary conditions."

In this case it appears that the animals were unloaded into open pens in which all livestock handled by the railroad company was handled and fed.

> The court said: "The stock pens at each of the points mentioned were sufficient to properly care for and protect the stock received at that point for shipment, or unloaded to be fed at that point under usual weather conditions."

> *Winn v. American Express Co.*, Iowa 140 N. W. 427:
> Quoting from the syllabus: "In an action against an express company for the death of a thoroughbred hog while being carried on an express wagon due to

excessive heat, evidence held insufficient to warrant a finding of negligence."

"Negligence of an express company will not be presumed from the fact that a thoroughbred hog died while being carried in a crate on an express wagon on a hot day where plaintiff shipper accompanied the wagon and knew every detail of what occurred."

"A shipper of a thoroughbred hog, and not the carrier, assumed the risk of the hog dying from being overheated, due to climatic conditions."

Colsch v. C., M. & St. P. Ry. Co., (Iowa) 127) N. W. 198:

Quoting from the syllabus: "A carrier of livestock accompanied by the shipper is not bound to use the highest degree of care to avoid injury to the stock through freezing; ordinary care being sufficient."

Elliott on Railroads, Second Ed., Vol. 4, Secs. 1548 and 1549:

"1548d. *Extraordinary climatic conditions*—Applying the principle which exonerates the carrier from liability for loss of goods attributable to an act of God as explained in earlier sections, it has been held that a carrier is not liable for loss or injury to livestock caused by unprecedented climatic conditions—as, for example, where animals contract pneumonia from an unusual drop in the temperature—if the carrier has otherwise made such provisions for protection of stock as are sufficient for ordinary conditions."

"1549. *Rule where owner accompanies the stock*—The fact that the owner, or his agent, is furnished transportation by the carrier and goes with his cattle or horses to look after and care for them, especially if he has agreed to do so in the contract of carriage, often exerts an important influence in determining the duties and liabilities of the carrier in the particular case. As we shall hereafter show it may relieve the carrier from the duty to feed and water and otherwise give particular attention to the stock, but it will not relieve the carrier from the duty to afford the owner reasonable opportunnities for so doing. The

fact that the owner accompanies the stock and takes charge of it may also be important upon the question of contributory negligence. So, where the owner accompanies the stock, under a special contract to care for them himself, he may well be presumed to be as well acquainted with the facts in regard to their loss or injury as the carrier, and as they may have been injured because of his own negligence, or because of their inherent nature and propensities, and not by the negligence of the carrier, it is but just to require him to show the facts. The rule in such cases, therefore, is that the burden of proof is upon the plaintiff to show that a breach of duty upon the part of the carrier caused the injury or loss, and if the carrier is liable only for negligence the burden is upon the plaintiff to show such negligence."

The burden of proof as to the negligence is upon the shipper and if the question was left in doubt as to what the cause of the damage was, then the defendant carrier would be entitled to the verdict.

Hutchinson on Carriers, Third Ed., Vol. 3, Sec. 1355, 1356, 1357.

Cleve v. C., B. & Q. R. Co., (Neb.) 120 N. W. 959:

"A railroad company shipping stock accompanied by the owner is not liable for loss occasioned by excessive heat in transit in the absence of competent evidence of negligence."

In this case the evidence showed that the plaintiff's employees were in charge of the cattle in transit; that the day of shipment was very hot and very little air circulating; and that the steers died as a result of the excessive heat to which they were subjected while the train was stopped at a station.

Wilke v. I. C. R. Co., (Iowa) 133 N. W. 746.

THIRD.—*Sixth Assignment of Error.*

This relates to the instruction requested by plaintiff in error, "that if the jury believed defendant in error did

not tender the thirty-six hour release, and that plaintiff in error could not or was not reasonably sure of transporting said animals on to destination, Phoenix, within the twenty-eight hours, the verdict should be for defendant."

The evidence, as heretofore pointed out, warranted the giving of this instruction. Defendant in error did not in his complaint base his claim for damages upon the ground that the carrier did not transport the animals to some point beyond Yuma other than destination, but bottomed his case upon the failure of the carrier to transport the animals all the way to destination without unloading for feed, water and rest. (Tr. p. 5).

In support of this assignment we will cite the same authorities cited in support of Assignment No. 5.

FOURTH.—*Seventh and Eighth Assignments of Error.*

This relates to the special charge requested by plaintiff in error that if the jury believed the animals upon arrival at Yuma had been confined in the cars approximately nineteen hours without feed or rest and that it was more humane and better for the animals to unload them at Yuma for feed and rest than to transport them beyond that point and keep them confined in the cars the verdict should be for the defendant; and to the special charge requested by plaintiff in error that if the jury believed it was less injurious to the animals to unload them at Yuma for feed and rest than to have kept them confined in the cars for nine or eighteen hours longer the verdict should be for defendant.

An expert witness produced by defendant in error, A. N. Gurley, a veterinary surgeon, testified that dairy cows, such as these animals were, ought to be milked twice in every twenty-four hours, and failure to do so would result in serious injury to them; that they should have access to

water continuously; that nineteen hours was too long a time for a dairy cow to go without a drink, especially in hot weather, and in the kind of weather prevailing at Yuma; and that it would have been much better for these cows to be unloaded at Yuma to be milked and watered than to be transported on any further (Tr. pp. 108, 109) and especially after bringing them from a cool, moist climate into Arizona in July (Tr. p. 109).

The witness also testified that it was better for the cattle to be unloaded and watered and reloaded at Yuma than to have brought them on to Phoenix, to destination (Tr. pp. 110, 111).

Witness Casey, an experienced cattle man also testified that it was better to unload the animals at Yuma for feed, water and rest than to have transported them to Phoenix (Tr. pp. 133, 134, 135).

Witness Davis, an experienced cattleman, also testified to the same effect. (Tr. pp. 138, 139, 140).

This was one of the principal issues of fact involved in the action, and should have been submitted to the jury, and the refusal of the court to give the special charges requested was prejudicial to plaintiff in error.

FIFTH.—*Ninth, Twelfth and Twenty-Fourth Assignments of Error—Failure of Defendant in Error to Give Plaintiff in Error Written Notice of his Claim within Ten Days.*

The ninth assignment relates to refusal of the court to grant a special charge requested by plaintiff in error, to the effect that if it was possible for defendant in error to have made the demand within the time he could not recover for any loss or damage to the animals actually delivered at destination.

The twelfth assignment relates to refusal of the court to grant special charge requested by plaintiff in error to

the effect that if the jury believed defendant in error knew or could have known by the exercise of reasonable diligence within ten days after unloading the animals at destination that 87 head were injured or damaged $20.00 per head, and did not within the ten days give the notice, he could not recover for such alleged loss or damage.

The twenty-fourth assignment relates to a portion of the general charge of the court with reference to defendant in error being relieved from giving such notice, and to the plaintiff in error having waived the giving of the notice, which portion of the charge was duly excepted to.

Defendant in error admitted making the contracts as pleaded by plaintiff in error (Tr. p. 86) and the contracts were admitited in evidence (Tr. p. 112).

These contracts contain a provision as follows:

"Second party (Stewart) hereby further agrees that in case any loss or damage shall have been sustained for which first party (Southern Pacific Co.) is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of the first party in writing within ten days after unloading of the livestock; and that in event of failure so to do all claims for loss or damage in the premises are hereby expressly waived, released and made void (Tr. p. 188).

Defendant in error admitted that he did not present any claim in writing to plaintiff in error or any of its agents within ten days and that he first presented such claim on or about October 2, 1913, long after the expiration of the ten days. (Tr. p. 85).

We concede that defendant in error would not be required to present his claim within the ten days as to any of the animals that died en route and before delivery at destination and the two requested instructions on this point only refer to the alleged claim for damages to the animals actually delivered at destination.

The court charged the jury in substance that if they believed defednant was negotiating with plaintiff for a settlement of his claim and that defendant knew the cattle had been injured as alleged, then the plaintiff was relieved and released from giving the notice within the ten days as required by the provision in the contract.

Defendant in error testified that he would not and did not pay the freight charges on the cattle when they arrived at Phoenix because his claim for damages was not adjusted (Tr. pp. 85, 88) but drove them away without paying the freight. (Tr. p. 88).

Defendant in error testified that within four or five days after delivery of the cattle a representative of plaintiff in error called on him at Phoenix and took up with him the question of settlement or adjustment of his claim. (Tr. p. 85).

The provision referred to in the contract did not require the shipper to itemize his claim and did not require him to verify such claim.

If the contract had required the shipper to file his claim within one day after unnloading at destination, or had required the claim for damages to be itemized and sworn to, then it might be said that such requirement was unreasonable and the shipper would be relieved from complying with it.

The case of Kidwell v. Oregon Short Line Railroad Company decided by this court, 208 Fed. 1, we think, disposes of the questions rasied by our assignments of error with reference to the "ten days' notice." In that case it appears that the shipper notified the agent of the carrier at Shosshone, en route, that he was going to put in a claim for side-tracking the cattle and "handling them bad;" that when he got to American Falls, another station en route, he told the agent of the company there would be a claim against the company for damages

sustained and injury to the cattle: That when he got to Laramie City, another station en route, he told the agent there that there would be a claim for damages on the "Short Line," and possibly some of it on the Union Pacific going south to Omaha; and that after the cattle were sold at South Omaha he talked with the agent there and told him the same thing, and that the agent advised him to put in the claim at Portland. The claim was put in at Portland, but it was after the expiration of ten days from the unloading of the stock at destination. This court in its opinion in the case said:

> "If, on arrival of livestock at destination, the shipper, who, as in this case accompanies them, finds that they have been injured by the negligence of the carrier, it is a reasonable provision of the shipping contract that he give notice to the carrier of the extent, nature, and amount of his claim for damages, and that this shall be done before the stock are mingled with other stock in order that the carrier may have the opportunity to make timely investigation and protect itself against fictitious or imaginary claims. It is no compliance with such a provision to remark to a freight agent of the carrier along the line of the route that the shipper is going to put in a claim for damages. Nor is it a compliance to inform the agent at the place of destination that there will be a claim against the company for damages. To impart the information that a claim will be presented is not to present 'a claim for loss, damage, or detention.' It does not inform the carrier of the nature, extent, amount, or cause of damage, it gives no definite statement of facts upon which an investigation may be had, or which shows that an investigation is required.
>
> "(2) A stipulation that notice of a claim for damages be given before the stock is removed or intermingled with other stock, as a condition precedent to recovery, is a reasonable one, and it has been so held by the Supreme Court of the State in which the contract in this case was made. Smith Meat Co. v. Ore-

gon R. & N. Co., 59 Ore. 206, 117 Pac. 303. And such is the uniform ruling of other courts on the same question. Clegg vs. S. Louis & S. F. R. Co. (C. C. A.) 203 Fed. 971; Metropolitan Trust Co. v. Toledo, S. L. & K. R. Co. (C. C.) 107 Fed. 628; Parill v. Cleveland, C., C. & St. L. Ry. Co., 23 Ind. App. 638, 55 N. E. 1026; Austin v. Railroad, 151 N. C. 137, 65 S. E. 757; Wichita & Western Ry. v. Koch, 47 Kan. 753, 28 Pac. 1013; Atlantic Coast Line R. Co. v. Bryan, 109 Va. 523, 65 S. E. 30; Southern Ry. Co. v. Adams, 115 Ga. 705, 42 S. E. 25; St. Louis & S. F. R. Co. v. Ladd, 33 Okl. 160, 124 Pac. 461. There was nothing in the circumstances, as disclosed by the record in the case at bar, to render the requirement of the notice negligible or impracticable, as in the case of Chicago, R. I. & P. Ry. Co. v. Spears, 31 Okl. 469, 122 Pac. 228. Nor was there any waiver of the notice on the part of the defendant. There was no error, therefore, in granting the nonsuit."

In the case of C., R. I. & P. Ry. Co. v. Spears (Okl.) 122 Pac. 228, referred to by this court in above case of Kidwell v. O. S. L. R. Co., the provision of the livestock shipping contract involved was one requiring the shipper to file his claim in writing immediately and before the animals were removed from the point of shipment or from the place of destination.

Other cases:

St. L. & S. F. Ry. Co., v. Zickapoose (Okl.) 135 Pac. 406.

Coffin v. A. T. & S. F. Ry. Co., 13 Ariz. 144, 108 Pac. 480.

Kramer v. C. M. & St. P. Ry. Co. (Iowa) 70 N. W. 119.

Libbey v. St. L. & I. M. S. Ry. Co. (Mo.) 177 S. W. 659.

Wright v. C. B. & Q. R. Co. (Mo.) 94 S. W. 555.

St. L. & S. F. R. Co. v. Cox (Okl.) 138 Pac. 144.

Howard & Callahan v. I. C. R. Co. (Ky.) 171 S. W. 442.

Smith v. St. L. S. W. Ry. Co. (Mo.) 171 S. W. 635.
Bowman v. M. K. & T. Ry. Co. (Mo.) 171 S. W. 642.

The case of Clegg v. St. L. & S. F. R. Co., (C. C. A., 8th Circuit) 203 Fed. 971, is directly in point on the question of waiver of the notice by the carrier.

In that case plaintiff pleaded that the general freight claim agent of the defendant carrier, with full authority to handle, deal with and adjust all claims against the defendant arising from the handling of livestock and freight, received notice of plaintiff's claim without objection as to the time of presentation, or the manner and form thereof, and that he negotiated with plaintiff, both orally and in writing on the subject of said claim; that by reason thereof the defendant waived the terms of the livestock shipping contract in question.

The court held that this did not constitute a waiver by defendant carrier of the provisions regarding the giving of notice.

We contend that this question is governed and controlled by the decision of the Federal Courts, because it comes under the Federal Act, the Carmack Amendment.

M. K. & T. Ry. Co. v. Harrison, 227 U. S. 657, 57 L. Ed. 690.

SIXTH.—*Fifteenth Assignment of Error.*

This relates to refusal of the court to give special charge requested by plaintiff in error, defendant below, to the effect that if the jury believed the alleged loss or damage was due to any other cause than unloading at Yuma, the verdict should be in favor of defendant.

Defendant in error, plaintiff below, in his complaint, based his claim for damages upon the fact that plaintiff in error, defendant below, unloaded the animals at Yuma instead of transportinng them on to Phoenix. (Tr. p. 5). This is the only negligence alleged in the complaint and defendant in error, if entitled to recover at all, was not entitled to recover on any other ground.

Witness Witkosky, an experienced cattleman, testified that he saw one of these cows shipped by Mr. Stewart from San Luis Obispo, that the cow was so poor and weak that she could not travel and fell down in the road to San Luis Obispo and that there was very little feed on the range at that time for cattle around San Luis Obispo. (Tr. p. 140).

Witnesses Ed Peterson and Millard Petersen, experienced cattlemen residing at San Luis Obispo, testified they helped to drive some of these cattle to the station of San Luis Obispo when they were shipped, that the cattle were in very poor condition and weak, and that the feed on the range where the cattle came from was very scarce. (Tr. pp. 141, 142).

Plaintiff in error, defendant below, in its answer pleaded this as a defense. (Tr. pp. 38, 39).

As this was an issue of fact raised by the pleadings and supported by the testimony, we contend that it should have been submitted to the jury. If any of the alleged loss or damage was due to the condition of the cattle when shipped, it follows that plaintiff in error was not liable therefor.

SEVENTH.—*Seventeenth and Nineteenth Assignments of Error.*

This relates to special charges requested by plaintiff in error, defendant below, to the effect that if the alleged loss or damage to said cattle was due to the heat or to climatic conditions, plaintiff could not recover; and that if *any* of the alleged loss or damage was due to such causes, plaintiff could not recover for such loss or damage.

As heretofore mentioned, the contracts in evidence provided among other things, that the shipper assumed all risk of loss or damage of or to said livestock resulting from heat, suffocation or climatic conditions. (Tr. pp. 23, 25, 27).

This issue was raised by the pleadings, the plaintiff in error, defendant below, set up and pleaded this as a defense in its annswer. (Tr. pp. 39, 40).

Plaintiff Stewart testified that he had lived in Arizona for fifteen years, had been engaged in the cattle businiess for a couple of years, had shipped cattle into Arizona from San Luis Obispo, California; that San Luis Obispo is near the coast; that it was not hot where he obtained the cattle; that he knew it was prety warm around Phoenix and Yuma, Arizona, in July; that he knew it was warm through Southern California at that season of the year where the cattle had to pass through; and that he selected the time for making the shipment. (Tr. p. 86).

Witness Ford, a former resident of San Luis Obispo, testified that the climate of that place is much cooler than that of Arizona. (Tr. p. 92).

Even in the absence of any agreement the general rule seems to be that a carrier is not liable for damages for injuries to livestock caused by heat or climatic conditions.

L. & N. R. Co. v. Warfield, supra.
Winn v. American Exp. Co., supra
Colsach v. C. M. & St. P. Ry. Co., supra.
Cleve v. C. B. & Q. R. Co., supra.
Elliott on Railroads, 2nd Ed., supra.

EIGHTH.—*Eighteenth Assignment of Error.*

Failure of defendant in error, Stewart, to properly attend to and care for his cattle while they were at Yuma.

Under the contracts Stewart agreed to unload and reload the animals at resting places, and to feed and water at his own expense, and to accompany and attend and care for said animals en route and to destination.

Plaintiff Stewart testified that he arrived at Yuma with the shipment about nine o'clock in the morning of July 4th, that neither he nor any of his men had anything to do with unloading the cattle; that he did not go to the

stock yards until about five o'clock in the evening. (Tr. p. 83). That he boarded a passenger train at Yuma and went to Phoenix. (Tr. p. 88).

Witness Ford, who accompanied the shipment as one of the caretakers, testified that the cattle had water when they arrived at Yuma; that he supposed if they had poured water on them immediately upon unloading at Yuma and kept pouring water on them undoubtedly they would have kept them from getting hot and that would have saved them; that if they (the caretakers) had stayed there and poured water on them it would have kept them from getting overheated. (Tr. p. 93). This witness also testified that Stewart did not help take care of the cattle at Yuma, and that he (Mr. Stewart) refused to help take care of the cattle. (Tr. p. 93).

Webster v. Union Pac. R. R. Co., supra.

NINTH.—*Twenty-Third Assignment of Error.*

This relates to that portion of the general charge of the court wherein the jury was instructed in effect that it was the positive duty of the carrier to have transported the cattle to some other station beyond Yuma, on its line of railroad, if the jury found that the railroad company had other corrals on its line of road in the direction in which the shipment was moving into which the cattle could have been unloaded within the twenty-eight hour period.

We have heretofore, under the second division of our argument (Assignment No. 5, Request for directed verdict) pointed out the testimony, with reference to pages of transcript, showing that at the time the cattle arrived at Yuma they had been confined in the cars without feed, water or rest for eighteen hours and fifty-five minutes; that they had been shipped from Los Angeles, California, to Yuma, Arizona, through a hot, dry, dusty, desert country; that the train carrying the cattle would necessarily have

had to remain at Yuma, in the yard, for the purpose of inspection, changing engines, changing crews, etc., for at least one hour; that said train did actually remain at Yuma for one hour and fifteen minutes; that the next station at which there were cattle pens was Gila, a distance of 123 miles; that the schedule time of such a train, had the five cars of cattle remained in it, from Yuma to Gila was ten hours; and that it would have taken said train ten hours to have made the run from Yuma to Gila if said five cars of cattle had remained in said train, which would have necessitated said cattle remaining in said cars, without feed, rest or water, for approximately thirty hours, and for a longer period than twenty-eight hours.

In view of this positive and uncontradicted testimony as to the length of time it would have taken for this train to have reached Gila Station, had the five cars of cattle remained in the train, this portion of the court's general charge was erroneous, because it meant in effect that the railroad company should take chances on getting the cattle to the next station and unloaded within the twenty-eight hour period.

The better rule would seem to be that the Twenty-eight Hour Law makes it the positive duty of the carrier to unload the animals for feed, water and rest within twenty-eight hours, and that if there is any doubt as to whether or not the shipment can reach another unloading point within the prescribed period, or if the carrier is not reasonably sure that the next unloading point can be reached within the time, that the carrier should not take any chances but should unload.

Act of Congress approved June 29, 1906, Twenty-eight Hour Law, supra.
St. L. & I. M. Ry. Co. v. Davenport, supra.
Hickey v. C. B. & Q. R. R. Co., supra
K. C. M. & O. Ry. Co. v. Moore, supra.

Ecton v. C. B. & Q. Ry. Co., supra.
Oregon-Washington R. & N. Co. v. United States, supra.
St. L. & I. M. S. Ry. Co., v. Smith, supra.

TENTH.—*Fourteenth and Twenty-Fifth Assignments of Error.*

Agreed Valuation.

Plaintiff in error, defendant below, requested the following special charge which was refused by the court (Tr. pp. 207 to 209, inc.), and to which ruling defendant duly excepted. (Tr. p. 177).

"If you believe from the evidence that plaintiff, at the time said animals were deliivered by him to defendant, at San Luis Obispo, California, for transportation by defendant, over its line of railroad and the line of railroad of its connecting carrier to Phoenix, Arizona, made and entered into the contract or contracts in writing, as set forth and pleaded by defendant, wherein and whereby it was agreed and stipulated by and between plaintiff and defendant that the agreed valuation of said animals was the sum of thirty dollars per head; and that plaintiff, by reason of said stipulation that the value of said animals was the said sum of thirty dollars per head, thereby obtained lower and cheaper freight rates for the transportation of said animals from San Luis Obispo, California, to Phoenix, Arizona, than would have been applicable to or assessed upon said shipment had a higher valuation been placed upon said animals; and that plaintiff by said contracts stipulated and agreed that in case any loss or damage should be sustained to said animals for which defendant would be liable, that the amount to be claimed by plaintiff for each of said animals, so lost or damaged, should be adjusted on the basis of the value of such animals at the time and place of said shipment, to-wit, on

July 1st, 1913, at San Luis Obispo, California, not exceeding the declared and agreed value thereof, to-wit, the sum of thirty dollars per head; and you further find that the loss and damage to the plaintiff's said animals, as alleged, was caused by the negligence of defendant as alleged by plaintiff, to-wit: the ulnoading of said animals at Yuma, Arizona; then you are instructed that plaintiff cannot in any event, recover herein, any greater sum for the animals that died in transit or before being removed from pens at destination, than the said sum of thirty dollars per head and the freight charges on same; and you are further instructed that plaintiff's claim for the animals alleged to have been injured in such transportation should be adjusted on a basis of said declared and agreed valuation of thirty dollars per head and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona; and that if said animals after delivery at destination to plaintiff were of the value of thirty dollars per head, and the freight charges on same from San Luis Obispo, California, to Phoenix, Arizona, plaintiff is not entitled to recover anything for said animals alleged to have been injured."

The court in its general charge instructed the jury as follows:

"The written contracts introduced in evidence limit the liability of the defendant company to thirty dollars for each animal injured or killed, and if you find for the plaintiff you should assess the damages at not exceeding thirty dollars per head for the cattle killed and not to exceed twenty dollars per head, the amount claimed in plaintiff's complaint, for the injury caused to each of said cattle by the defendant's negligence. The measure of damages in case of injury to the cattle under the contract is the amount of actual damages to each of said cattle so injured, resulting from the negligence of the defendant,

its agents or employes, in no case to exceed twenty dollars per head. The measure of damages as to those that were killed is not exceeding thirty dollars per head. A shipper will not be heard to claim or recover for damages or loss, however great, in excess of the amount claimed in the bill of lading as the agreed value; nor will the carrier be allowed to deny liability for actual damages up to that amount, except, as in this case, where a less amount is claimed in the complaint, which in this case is twenty dollars per head for each of the cattle injured and not killed. The carrier must respond for negligence up to that value but no further. If you come to the conclusion that the plaintiff is entitled to recover some damages, then, as I have heretofore stated, the measure of his damages for the eleven head of cattle that died, if you believe they died as a result of the defendant's negligence, would be not exceeding thirty dollars per head, and the measure of damages for the cattle that were injured by reason of the defendant's negligence would be the difference between the market value of the said cattle in their normal condition after making the trip from San Luis Obispo, California, to Phoenix, Arizona, and the condition in which they were actually delivered at Phoenix, but in no event can such injury or damages to each cow be placed at a figure in excess of twenty dollars; in other words, in arriving at the damages, if any, to be awarded to the plaintiff by reason of the cattle injured, if any, through the negligence of the defendant company, the measure of such damages will be the depreciation in the market value of the cattle by reason of such injury or injuries, such damages in no event, however, to exceed the sum of twenty dollars per head. If you believe that eighty-seven head of the plaintiff's cattle or any lesser number were damaged as set forth in plaintiff's complaint, and as a result of the negligent handling and transportation of the cattle by defendant, you may award

the plaintiff damages in a sum not exceeding twenty dollars per head, the amount alleged in plaintiff's complaint, and I further instruct you that in arriving at the damage suffered by the plaintiff you may consider the market value of cattle in their normal and healthful condition, of the grade and quality of plaintiff's cattle in the Salt River Valley at the time the injuries to his cattle were sustained, and you may then consider the price for which plaintiff sold his cattle in their injured condition, if you find from the evidence that the cattle *were* injured, and the difference in their market value in their normal condition and their value in their injured condition is a proper measure of plaintiff's damages, as I said before, not exceeding twenty dollars per head for the cattle injured." (Tr. pp. 172-173, 174).

The contracts contained, among other things, the following provision:

"Second party hereby further agrees that in case any loss or damage shall be sustained for which first party is liable, demand or claim for such loss or damage will be made by second party on the Freight Claim Agent of first party in writing, within ten days after unloading of the livestock; and that in the event of failure so to do, all claims for loss or damage in the premises are hereby expresly waived, released and made void, *and it is also expressly agreed by second party that the amount to be by him claimed for each animal as described herein, so lost or damaged, shall be adjusted on basis of value at time and place of shipment, not exceeding the declared value as hereinbefore set forth*, and on which declared value the rate or rates of transportation hereinbefore named by first party are based; *and in no event is there to be any recovery from first party or its lessors for any loss or damage to said livestock from whatsoever cause arising in excess of the declared value hereinbefore set forth.*" ..(Tr. pp. 23, 25, 27).

The contracts also contained the following:

"Declared value per head to be entered by shipper:

$30.00" (Tr. pp. 23, 25, 27).

Defendant in error, Stewart, admitted making the contracts (Tr. p. 86) and the same were admitted in evidence. (Tr. p. 112).

It was stipulated upon the trial:

"That in July, 1913, there was more than one rate in effect on livestock, on the lines of the Southern Pacific Company and its connecting carriers, from San Luis Obispo, California, to Phoenix, Arizona. That there was in effect at such time, in accordance with the tariffs, a sliding scale of rates based upon the valuation per head of the livestock. That if the cattle involved in this suit had been shipped on a higher valuation a higher rate would have been assessed against such shipment, in accordance with such tariffs, and that the tariffs in effect provided for such different rates in accordance with the declared valuation as specified in the livestock shipping contracts. That such tariffs are and were on file with the Interstate Commerce Commission. (Tr. pp. 128, 129).

Plaintiff Stewart testified that he sold the eighty-seven head of cows for sixty-five dollars a head, after arrival at destination and after having received the alleged injuries, and that they would have been worth eighty-five dollars a head in their normal condition. (Tr. p. 85).

The court in its charge to the jury instructed them that the measure of damages for the injured cattle was the difference between the market value of the cattle in their normal condition after making the trip, and their value in the condition in which they were actually delivered, not to exceed twenty dollars per head. (Tr. p. 173). In other words that the measure of damages would be the depreciation in the market value of the cattle by reason of the injuries, not to exceed the sum of twenty dollars per head. (Tr. p. 173).

This, we contend was an erroneous interpretation or construction of the terms of the written contracts. Under this construction the jury could have found for plaintiff damages in the sum of thirty dollars per head for the eighty-seven head alleged to have been injured, and plaintiff would still have had the eighty-seven head worth fifty-five dollars a head. Or, if the plaintiff had sold eighty-seven head for fifty-five dollars a head, almost double the agreed and declared valuation of thirty dollars a head, the jury could have found in favor of plaintiff damages in the sum of thirty dollars a head.

It will be conceded that if all these cattle had been killed during the course of the shipment through the negligence of the carrier, that the extent of plaintiff's recovery would have been thirty dollars per head.

Adams Exp. Co. v. Croninger, 226 U. S. 499, 57 L. Ed. 314.

K. C. So. Ry. Co. v. Carl, 227 U. S. 639, 57 L. Ed. 683.

M. K. & T. Ry. Co. v. Harriman, 227 U. S. 657, 57 L. Ed. 690.

Wells Fargo & Co. v. Nieman-Marcus Co., 227 U. S. 469, 57 L. Ed. 600.

Hart v. Penn. R. R. Co., 112 U. S. 331, 28 L. Ed. 717.

If these eighty-seven head had been damaged by the negligence of the carrier so that their actual value in such injured or damaged condition had been less than the agreed or declared valuation of thirty dollars per head—say, twenty dollars per head, then the recovery would have been limited to the difference between such actual value in such damaged condition and the agreed valuation, or ten dollars per head.

Jennings v. Smith, (C. C. A., Seventh Circuit) 106 Fed. 139: In this case the shipper, Jennings, brought suit against Smith, as receiver of the Atlantic & Pacific Ry. Co., to recover damages in the sum of three thousand dol-

lars for injuries to four race horses and for loss of some other personal property caused by a collision. The carrier, defended on the ground that the shipper had executed a livestock shipping contract similar to the contracts involved in the case at bar, whereby the shipper fixed the value of the horses at $100.00 each. It was stipulated upon the trial in the Circuit Court that the total value of the four horses after the accident was $90.00 ($22.50 per head) and that the value of the other property which was destroyed was $125.00. Proof was received on behalf of the plaintiff, under objection, that the actual value of the horses as delivered for carriage was $2500 or $3000. At the close of the testimony in the trial court, the court instructed the jury that the plaintiff was bound by the valuation of the horses stated in the contract and directed a verdict accordingly at the valuations otherwise stipulated, finding the defendant guilty and assessing the plaintiff's damages at $435.00 ($77.50 per head) for the horses in their injured condition, being the difference between the agreed valuation of $100.00 per head and their actual value in such injured condition, $22.50 per head, or $310.00 for the four horses and $125.00 for the other personal property destroyed, totalling $435.00.

The judgment of the Circuit Court was affirmed by the Circuit Court of Appeals.

Under the rule announced by the decision in the case of Jennings v. Smith, supra, it would seem that in a case where the animals were worth more after arrival at destination and after having received the alleged injuries than the agreed or declared valuation, that the shipper would not be entitled to recover anything. If this is the correct rule, then the requested instruction referred to should have been given, and the instruction given by the court in its general charge on this subject was entirely erroneous.

However, we very earnestly insist that the correct rule to be applied in this case is that plaintiff was only entitled

to recover such a proportion of the actual loss as the declared or agreed value bore to the actual value.

This rule is supported by the greater weight of authority:

Hutchison on Carriers, 3rd Ed., Sec. 429:—

"*Measure of Recovery where loss is only partial.*— Where the parties have agreed that in the event of loss the liability of the carrier shall not exceed a certain sum at which it is stipulated the goods are valued, the question arises as to the extent of the carrier's liability where there has been only a partial loss of the goods. While it is held by some courts that the owner of the goods will be entitled to recover an amount equal to the actual loss sustained, providing such amount is not greater than the sum at which the goods are valued, the better rule would seem to be that he should be confined in his recovery to an amount equal to that proportion of the real loss that the declared value of the goods bears to their actual value as it existed before the loss occurred. Where the parties have stipulated that the carrier's liability in case of loss shall not exceed the sum at which the goods are valued, it is hardly reasonable to suppose that it was thereby intended that the carrier, in the event of only a partial loss, should be liable for an amount which might be equal to the sum fixed as the value of the goods, thus making it possible for the same amount to be recovered where the loss was only partial as would be recoverable where the loss was total. The owner, therefore, is held not to be estopped by the statement as to value from showing what the real value of the goods was for the purpose of arriving at the correct proportion."

United States Express Co. v. Joyce, et al. (Ind.) 72 N. E. 865: This case involved claims for damages for injuries to two shipments of horses.

The first shipment consisted of 28 horses, actual value $4760.00, declared value $2100.00, actual loss $2038.24.

The court held the shipper was only entitled to recover the sum of $899.22.

The second shipment also consisted of 28 horses, actual value $4760.00, declared value $2100.00, actual loss $1437.30. The court held the carrier only liable for damages in the sum of $634.10.

We quote the following excerpts from the opinion of the Supreme Court of Indiana in this case:

> "The questions presented by this appeal are: First: in an action brought by a shipper against a carrier for injury to goods shipped, is the former precluded from showing their real value when he has previously signed a contract for their transportation providing that the carrier shall be liable only for actual damages suffered, and in no event for a greater amount than the valuation of the property declared by the shipper and inserted in the contract? Second: If he is not so precluded, what is the measure of his damages for a partial loss of the goods where they have realized in their damaged condition a sum equal to or greater than their declared value?"
>
> "It does not follow that the appellees may here recover to the full limit of the appellant's stipulated liability by showing that the difference between the true value of the animals if sound and the net proceeds from their sale is a sum equal to the largest amount for which the appellant agreed to be liable. The contract, it is true, expressly provided that the appellant would answer to the extent of actual damages, not to exceed $2100 per car load; and in Brown v. Cunard Steamship Co., 147 Mass. 58, 16 N. E. 717, Starnes v. Louisville Co., 91 Tenn. 416, 19 S. E. 675, and Nelson v. Great Northern Ry. Co., (Mont.) 72 Pac. 642, it was held that there might be a recovery, even in case of partial loss, up to the agreed limit of liability, irrespective of the value of the goods in their damaged condition or the amount ultimately realized from their sale; but this view does not commend itself to our minds. It is unreasonable to suppose that the carrier

agreed to pay the full measure of the damages recoverable in case of a total loss, when the loss was only partial.

"It was certainly contemplated by both parties that the amount of recovery should vary in case a horse was killed outright and in the event that only an eye was injured. When the parties agreed upon a valuation it may fairly be said that they each assumed a portion of the risk of injury in case of a total or partial loss. The carrier's liability was fixed, not arbitrarily by the appellant, but in a sum mutually agreed upon as the largest amount which he would be called upon to pay in any event. The liability of the shipper was equally well understood, though not expressed to be the difference, if any existed, between the value so declared by the shipper and the actual value of the goods. If a total loss occurred, both were to bear the burden in these respective amounts; the carrier responding to the full extent of this agreed liability, and the shipper losing the difference between the value he placed upon the goods and the value they really possessed. If the loss should be partial it is only just that the parties should bear it in proportion to their several express or implied liabilities. Hence the true method of ascertaining the damages would be to throw upon the carrier such a proportion of the real loss as the declared value bears to the actual value; that is to say, as the declared value of the injured property is to its actual value, so the amount of recoverable damages is to the amount of the real loss. Such is the method adopted in marine insurance to ascertain the proportions in which the insurer and the insured shall sustain a partial loss under a valued policy. The same rule though in different terms, is stated by the Supreme Court of the United States as follows in London Assurance v. Companhia De Moagens Do Barreiro, 167 U. S. 149, 17 Sup. Ct. 785, 42 L. Ed. 113: "The damaged goods, upon reaching their destination, must be at once sold for the best price that can be had. It is then to be determined what the goods must have been worth in the same market had they

been sound, and the difference between the sound value and the proceeds of the sale of the damaged article gives the ratio of deterioration, and the underwriter is to pay the ratio or percentage of loss on the policy value.' The above mode of determining the damages recoverable upon a partial loss appears to be recognized in Goodman v. M. K. & T. Ry. Co., 71 Mo. App. 460, at page 463, where the court says: 'By the terms of the special contract shown in this case the plaintiff could not have recovered, if there had been a total loss of any article of furniture, more than $5 per one hundred pounds. It is clear that for a partial loss of such article he should not recover on a basis of the actual value of the goods, but only the *proportionate value* (our italics) fixed by the contract, and so the trial court instructed the jury. But the jury seems not to have heeded such instruction. The evidence in plaintiff's behalf tended to show the actual loss or damage to the goods, without reference to the limit fixed by the contract, and the verdict shows that he was permitted to recover the actual amount of damages without reference to a proportionate reduction made necessary by the contract.' In St. L. I. M. & S. Ry. Co. v. Lesser, 46 Ark. 236, at page 243, the court in a case similar to the present, held that the following instruction should have been given: 'For a partial loss the measure of damages is, what proportion of $100 (the declared value) said horse was lessened in value by reason of the injury.' The contract in that case provided for the payment of $100 in case of total loss, and that 'in case of injury or partial loss the amount of damages claimed shall not exceed the same proportion.' Adopting this method of apportioning the loss, upon the first shipment of May 23, 1901, the actual value of the 28 horses was $4760; their declared value $2100. The net amount realized from the sale of said 28 horses was $2721.76. The actual loss was therefore $2038.24, and of this the appellant is answerable in the amount of $899.22, interest to be added. Upon the second shipment of June 13, 1901, the actual value of the 28 horses shipped was $4760; their declared

value $2100. The net amount realized from the sale of said 28 horses was $3322.70. The actual loss was therefore $1437.30, of which amount the appellant is answerable in the sum of $634.10, interest to be added—making, with the loss on the first shipment, a total of $1533.32, with interest"

Frank v. Michigan Cent. R. Co., 154 N. Y. Supp. 701: This was a case involving a claim for damages to shipment of horses. The shipping contract provided that the valuation of the horses should be $100.00 each and in no event should the carrier's liability exceed $1200.00 upon any carload.

We quote as follows from the opinion of the court:

"The plaintiff contends that he is entitled to recover the entire loss, because it is less than the amount limited by the terms of the shipping contract. The defendant contends, first, that it is not liable for any of the loss, because the evidence shows that the horses were worth, after being injured, more than the valuation placed upon each of the horses; and, second, that in any event it is not liable for more than such proportion of the actual loss as the declared valuation bears to the actual value, namely, $230.24. The actual loss sustained by the plaintiff was $888.82, there being a loss upon each of the horses except two; but none of the horses was worth less than $100 after the injury.

"I am of the opinion that the plaintiff is entitled to recover, but only the lesser amount. I shall not stop to analyze the various decisions which have been cited. It is not claimed that any are precisely in point, and I am not aware of any authoritative decision upon the exact question here involved. The reasoning of the cases, I think, sustains the conclusions here reached. As is well stated in Hutchison on Carriers: * * * *

"The valuation clause in question here is not an exemption of the defendant from liability for its own negligence. Such exemption is not permissible under the federal rule (Adams Express Co. v. Croninger, 226 U. S. 491, 33 Sup. Ct. 148, 57 L. Ed. 314, 44 L. R. A.

(N. S.) 257 by which this case must be determined, as the shipment was interstate. In the case last cited it was held that the limitation as to value has no tendency to exempt from liability for negligence; that it does not induce want of care, but exacts from the carrier the measure of care due to the value agreed on. The decision of that case was placed upon the distinct ground that such a contract is valid when fairly made, as a basis for a freight rate, and a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. The horses shipped were invoiced at about half their value. If there had been a total loss, the carrier would have been liable for but half their actual value. I think the rule holds good where there is a partial loss."

Plaintiff claimed the full amount of the actual damages, $882.82, but the court rendered judgment for the sum of $230.24, being the proportion of such actual damages as the declared value bore to the actual value.

In the case at bar, as to the eighty-seven head alleged to have been injured, the actual value (according to plaintiff's testimony) was $85.00 per head; declared value $30.00 per head, and the actual damage $20.00 per head.

Applying the above-mentioned rule in arriving at the amount recoverable we find that the sum of $7.05 bears the same proportion to $20.00 (the actual damage to each head as alleged) as $30.00, the declared valuation bears to the actual value $85.00.

Therefore plaintiff was only entitled in any event to recover the sum of $7.05 per head for the eighty-seven head alleged to have been injured instead of $20.00 per head, and for this reason the trial court erred in refusing to give the instruction requested and also erred in charging the jury that plaintiff could recover the full amount of the alleged damages, $20.00 per head.

Under the instructions as given by the court the jury found the full amount of damages claimed to the eighty-seven head alleged to have been injured, $20.00 per head, $1740.00, also $30.00 per head for the eleven dead ones, $330.00, and $20.00 expenses, totaling $2,090.00.

It is respectfully submitted that the judgment should be reversed with directions to enter judgment for defendant.

J. C. FOREST,
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